

Feb 24, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TIMOTHY T.,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

No. 2:19-CV-00030-JTR

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 14, 15. Attorney Chad L. Hatfield represents Timothy T. (Plaintiff); Special Assistant United States Attorney Lars Joseph Nelson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

<sup>1</sup> Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 **JURISDICTION**

2 Plaintiff filed applications for Disability Insurance Benefits and  
3 Supplemental Security Income on May 10, 2017, alleging disability since March 6,  
4 2017,<sup>2</sup> due to pulmonary embolism, low back pain, insomnia, migraines, left  
5 shoulder injury, and left wrist injury. Tr. 85-86. The applications were denied  
6 initially and upon reconsideration. Tr. 131-39, 142-55. Administrative Law Judge  
7 (ALJ) R.J. Payne held a hearing on July 20, 2018, Tr. 33-82, and issued an  
8 unfavorable decision on August 22, 2018, Tr. 15-27. Plaintiff requested review  
9 from the Appeals Council. Tr. 211, 317. The Appeals Council denied the request  
10 for review on November 14, 2018. Tr. 1-5. The ALJ's August 2018 decision  
11 became the final decision of the Commissioner, which is appealable to the district  
12 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review  
13 on January 18, 2019. ECF No. 1.

14 **STATEMENT OF FACTS**

15 Plaintiff was born in 1988 and was 28 years old as of his alleged onset date.  
16 Tr. 25. He has a GED and his work history has been primarily in construction. Tr.  
17 607. In February 2017, Plaintiff suffered a pulmonary embolism and was  
18 hospitalized for five days. Tr. 365. For the next several months he had difficulty  
19 breathing and was having significant coughing fits, including coughing up blood  
20 on a regular basis. Tr. 419, 438, 453, 462, 471, 482. He testified he was unable to  
21 do anything other than lay in bed and take medication. Tr. 56-58. In October  
22 2017, Plaintiff began a training program with a siding business, but was unable to  
23 meet the work demands as he was missing too many days due to his breathing  
24 condition. Tr. 39. In Spring 2018, his medications were adjusted, and he returned  
25 to full time work in June. Tr. 40.

26 **STANDARD OF REVIEW**

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<sup>2</sup> Plaintiff later amended the alleged onset date to February 27, 2017. Tr. 42.

1 The ALJ is responsible for determining credibility, resolving conflicts in  
2 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
3 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with  
4 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
5 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
6 only if it is not supported by substantial evidence or if it is based on legal error.  
7 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
8 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
9 1098. Put another way, substantial evidence is such relevant evidence as a  
10 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
11 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
12 rational interpretation, the Court may not substitute its judgment for that of the  
13 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
14 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
15 administrative findings, or if conflicting evidence supports a finding of either  
16 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
17 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
18 supported by substantial evidence will be set aside if the proper legal standards  
19 were not applied in weighing the evidence and making the decision. *Browner v.*  
20 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 21 **SEQUENTIAL EVALUATION PROCESS**

22 The Commissioner has established a five-step sequential evaluation process  
23 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
24 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through  
25 four, the burden of proof rests upon the claimant to establish a prima facie case of  
26 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is  
27 met once a claimant establishes that a physical or mental impairment prevents the  
28 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),

1 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds  
2 to step five, and the burden shifts to the Commissioner to show (1) the claimant  
3 can make an adjustment to other work; and (2) the claimant can perform specific  
4 jobs that exist in the national economy. *Batson v. Comm’r of Soc. Sec. Admin.*,  
5 359 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment  
6 to other work in the national economy, the claimant will be found disabled. 20  
7 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 8 ADMINISTRATIVE DECISION

9 On August 22, 2018, the ALJ issued a decision finding Plaintiff was not  
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
12 activity since the alleged onset date. Tr. 17.

13 At step two, the ALJ determined Plaintiff had the following severe  
14 impairment: pulmonary embolism. Tr. 18.

15 At step three, the ALJ found Plaintiff did not have an impairment or  
16 combination of impairments that met or medically equaled the severity of one of  
17 the listed impairments. Tr. 20-21.

18 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and found  
19 he could perform less than a full range of medium work and had the following  
20 specific limitations:

21 The claimant can lift no more than 50 pounds at a time and lift or  
22 carry 20 pounds at a time frequently. He has no limitations sitting and  
23 can stand and walk six hours total, in any combination, in an eight-  
24 hour workday with normal breaks. He can frequently push or pull  
25 leg-foot controls within the weight limitations given. The claimant  
26 can occasionally stoop; balance; crouch; kneel; and crawl. He can  
27 frequently climb ramps and stairs. He can never climb ladders or  
28 scaffolds. The claimant can have occasional exposure to heavy  
industrial-type vibration. He can tolerate frequent exposure to marked  
temperature extremes of heat/cold, humidity and wetness. He can

1 have no exposure to unprotected heights and hazardous moving  
2 machinery. He can never perform commercial driving due to the  
3 effects of prescribed medication (Warfarin).

4 Tr. 21.

5 At step four, the ALJ found Plaintiff was unable to perform his past relevant  
6 work as a construction worker and field artillery crew member. Tr. 25.

7 At step five, the ALJ determined that, based on the testimony of the  
8 vocational expert, and considering Plaintiff's age, education, work experience, and  
9 RFC, there were jobs that existed in significant numbers in the national economy  
10 that Plaintiff was capable of performing, including the jobs of kitchen helper,  
11 housekeeping cleaner, cafeteria attendant, and final assembler. Tr. 25-26.

12 The ALJ thus concluded Plaintiff was not under a disability within the  
13 meaning of the Social Security Act at any time from the alleged onset date through  
14 the date of the decision. Tr. 26.

## 15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's  
17 decision denying benefits and, if so, whether that decision is based on proper legal  
18 standards.

19 Plaintiff contends the ALJ erred by (1) improperly rejecting the opinion of  
20 consultative examiner Dr. Dyck; (2) finding mental health impairments non-severe  
21 at step two; (3) rejecting Plaintiff's subjective complaints; and (4) making step five  
22 findings that are unsupported.

## 23 DISCUSSION

### 24 1. Step two

25 Plaintiff argues the ALJ erred in finding his mental impairment to be non-  
26 severe at step two. ECF No. 14 at 11-12.

27 At step two of the sequential evaluation process, the ALJ must determine  
28 whether the claimant has any medically determinable severe impairments. 20  
C.F.R. §§ 404.1520(a)(ii), 416.920(a)(ii). An impairment is "not severe" if it does

1 not “significantly limit” the ability to conduct “basic work activities.” 20 C.F.R.  
2 §§ 404.1522(a), 416.922(a). Basic work activities are “abilities and aptitudes  
3 necessary to do most jobs.” 20 C.F.R. §§ 404.1522(b), 416.922(b). “An  
4 impairment or combination of impairments can be found not severe only if the  
5 evidence establishes a slight abnormality that has no more than a minimal effect on  
6 an individual’s ability to work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.  
7 1996) (internal quotation marks omitted). The step-two analysis is “a de minimis  
8 screening device used to dispose of groundless claims.” *Webb v. Barnhart*, 433  
9 F.3d 683, 687 (9th Cir. 2005).

10 Plaintiff asserts he has met his burden of demonstrating his anxiety is severe,  
11 and argues that the medical records and opinions are more than enough to meet the  
12 *de minimus* step two threshold. ECF No. 14 at 11-12. Defendant asserts the ALJ’s  
13 rationale is supported by substantial evidence, and argues Plaintiff has simply  
14 offered an alternate interpretation of the record. ECF No. 15 at 3-5. Defendant  
15 further argues that even if the ALJ erred, any error was harmless because the  
16 primary symptom of anxiety reported by Plaintiff was shortness of breath and  
17 difficulty breathing, which are addressed in the RFC. *Id.* at 5-6.

18 The ALJ found Plaintiff’s medically determinable impairment of anxiety did  
19 not cause more than minimal limitations in Plaintiff’s ability to perform basic  
20 mental work activities and was therefore nonsevere. Tr. 18. In making this  
21 finding, the ALJ asserted Plaintiff did not describe any mental health symptoms  
22 and admitted the ability to independently perform his activities of daily living,  
23 which were wide-ranging. Tr. 18-19. The ALJ further relied on the records  
24 showing little or no abnormality in Plaintiff’s mental status during routine medical  
25 care, and evidence that his mental health symptoms remained mild and stable even  
26 after he stopped taking psychotropic medication. Tr. 19. Finally, the ALJ afforded  
27 great weight to the psychological medical expert at the hearing, who reviewed the  
28

1 entire record and found little or no objective findings consistent with significant  
2 mental status abnormality. *Id.*

3 The ALJ properly relied on substantial evidence in reaching the conclusion  
4 that Plaintiff's anxiety was nonsevere. The ALJ engaged in the required analysis  
5 of the so-called "Paragraph B" criteria in assessing the severity of Plaintiff's  
6 mental health. Tr. 20. "[W]hen the evidence is susceptible to more than one  
7 rational interpretation, we must uphold the ALJ's findings if they are supported by  
8 inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104,  
9 1111 (9th Cir. 2012). Though Plaintiff offers an alternative interpretation of the  
10 evidence, he identifies no specific legal error in the ALJ's rationale. The Court  
11 finds the ALJ's analysis to be supported by substantial evidence.

## 12 **2. Opinion evidence**

13 Plaintiff alleges the ALJ improperly rejected the opinion of consultative  
14 examiner Dr. Dennis Dyck, PhD. ECF No. 14 at 9-11.

15 When an examining physician's opinion is contradicted by another  
16 physician, the ALJ is required to provide "specific and legitimate reasons" to reject  
17 the opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific  
18 and legitimate standard can be met by the ALJ setting out a detailed and thorough  
19 summary of the facts and conflicting clinical evidence, stating his interpretation  
20 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
21 1989).

22 On December 1, 2017, Plaintiff underwent a consultative psychological  
23 exam with Dr. Dyck. Tr. 606-09. Dr. Dyck diagnosed Plaintiff with generalized  
24 anxiety disorder with moderate symptoms. Tr. 608. He offered the following  
25 comments regarding Plaintiff's functional abilities:

26 His ability to interact with coworkers and the public is likely mildly  
27 impaired. Due to his anxiety, his ability to maintain regular  
28 attendance in the workplace is moderately impaired. His ability to

1 complete a normal workday or workweek without interruption from  
2 his anxiety is likely mildly to moderately impaired. His ability to deal  
3 with the usual stress encountered in the workplace is moderately  
4 impaired if it involves being around other individuals. He appears to  
5 have significant physical limitations that would be better assessed by a  
6 medical provider.

6 Tr. 609.

7 The ALJ gave the opinion partial weight, noting the lack of objective  
8 findings of mental status abnormality, Plaintiff's improvement with medication,  
9 and his wide range of independent activities of daily living. Tr. 19-20. The ALJ  
10 further noted some of Dr. Dyck's conclusions were inconsistent with the absence  
11 of objective findings, and that the opinion was internally inconsistent in finding no  
12 more than a mild impairment in interacting with others, but still concluding  
13 Plaintiff would have moderate limitations in dealing with stressors if it involved  
14 being around other individuals. Tr. 20.

15 Plaintiff argues the ALJ erred in failing to address the opinion regarding  
16 maintaining attendance, offered no specific reasons for rejecting any of the  
17 limitations, and otherwise concluded that the opinion was supported by objective  
18 evidence and was consistent with the record. ECF No. 14 at 10-11. Defendant  
19 argues the ALJ reasonably gave more weight to the medical expert who testified at  
20 the hearing, and that the ALJ did not outright reject Dr. Dyck's opinion, as it was  
21 not phrased in terms of concrete functional limitations. ECF No. 15 at 6-7.  
22 Defendant further asserts that, to the extent the ALJ did reject the opinion, he gave  
23 sufficient reasons. *Id.* at 7-9.

24 The Court finds the ALJ did not err in his evaluation. An ALJ may consider  
25 an opinion's consistency with the record as a whole and the amount of explanation  
26 offered by the source in determining the weight assigned. 20 C.F.R. §§  
27 404.1527(c), 416.927(c). An ALJ may also reject an opinion that is internally  
28 inconsistent. *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir.



1 1999). The ALJ's assessment of Dr. Dyck's opinion as appearing internally  
2 inconsistent and lacking explanation for the moderate limits assessed is a  
3 reasonable interpretation of the record.

### 4 **3. Plaintiff's symptom statements**

5 Plaintiff alleges the ALJ erred in rejecting his symptom testimony without  
6 providing adequate reasons. ECF No. 14 at 12-17.

7 It is the province of the ALJ to make credibility determinations. *Andrews v.*  
8 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be  
9 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
10 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for  
11 rejecting a claimant's testimony must be "specific, clear and convincing." *Smolen*  
12 *v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834  
13 (9th Cir. 1995).

14 The ALJ found Plaintiff's medically determinable impairments could  
15 reasonably be expected to cause the alleged symptoms; however, he found  
16 Plaintiff's statements concerning the intensity, persistence and limiting effects of  
17 his symptoms were not entirely consistent with the medical evidence and other  
18 evidence in the record. Tr. 22. The ALJ found Plaintiff's allegations to be  
19 undermined by his activities of daily living, his work activity during the period of  
20 claimed disability, his improvement with treatment, lack of support from the  
21 objective medical evidence, and treatment noncompliance. Tr. 22-24.

22 Plaintiff argues the ALJ engaged in a general review of the medical evidence  
23 and treatment, and failed to explain how the evidence discounted Plaintiff's  
24 subjective statements. He also asserts the ALJ repeatedly misstated the standard  
25 for disability when citing evidence that did not indicate total incapacity to work, as  
26 an individual need not be totally incapacitated in order to qualify for disability.  
27 Plaintiff further argues the ALJ improperly ignored medical opinions supportive of  
28 Plaintiff's testimony and improperly cited isolated instances of improvement that

1 did not accurately represent the waxing and waning of symptoms. ECF No. 14 at  
2 12-17.

3 Defendant asserts the ALJ did not apply the incorrect standard, and rather  
4 appropriately assessed a variety of legitimate factors that indicate Plaintiff's  
5 allegations were less than reliable. ECF No. 15 at 9-17.

6 As an initial matter, the Court finds no error in the standards applied by the  
7 ALJ. Plaintiff is correct that the Social Security Act does not demand complete  
8 incapacity in order for a claimant to be eligible for benefits. Social Security Ruling  
9 96-8p; *Smolen*, 80 F.3d at 1287 n.7 ("The Social Security Act does not require that  
10 claimants be utterly incapacitated to be eligible for benefits."). However, the  
11 ALJ's use of the phrases "total disability" and "total incapacity to work," when  
12 read in context, do not indicate the ALJ abrogated the standard for disability. Tr.  
13 22. The ALJ accurately set forth the standards for disability in his statement of  
14 applicable law, and completed the five step sequential evaluation process.

15 The Court finds that the ALJ's reasoning is supported by substantial  
16 evidence. In assessing a claimant's subjective symptom complaints, an ALJ may  
17 consider the claimant's daily activities, precipitating and aggravating factors, and  
18 the type and effectiveness of treatments. 20 C.F.R. §§ 404.1529(c)(3),  
19 416.929(c)(3). A claimant's daily activities may support an adverse credibility  
20 finding if the activities contradict his other testimony. *Orn v. Astrue*, 495 F.3d  
21 625, 639 (9th Cir. 2007). Although it cannot serve as the sole ground for rejecting  
22 a claimant's symptom statements, objective medical evidence is a "relevant factor  
23 in determining the severity of the claimant's pain and its disabling effects."  
24 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). Unexplained or  
25 inadequately explained reasons for failing to seek medical treatment or follow  
26 prescribed courses of treatment can cast doubt on a claimant's subjective  
27 complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). The ALJ  
28 appropriately relied on the above factors in reaching his conclusions regarding the

1 reliability of Plaintiff's symptoms allegations. The ALJ's interpretation of the  
2 record is supported by substantial evidence.

3 **4. Step five findings**

4 Plaintiff argues that the ALJ erred in his step five determination because the  
5 testimony of the vocational expert was premised on an incomplete hypothetical  
6 stemming from an inaccurate residual functional capacity determination. ECF No.  
7 14 at 17-18. Plaintiff's argument is based on successfully showing that the ALJ  
8 erred in his treatment of the symptom statements and medical opinions. *Id.*  
9 Because the Court finds that the ALJ did not harmfully err in his step two findings,  
10 rejection of Dr. Dyck, or evaluation of Plaintiff's subjective statements, Plaintiff's  
11 argument is without merit.

12 **CONCLUSION**

13 Having reviewed the record and the ALJ's findings, the Court finds the  
14 ALJ's decision is supported by substantial evidence and free of legal error and is  
15 affirmed. Therefore, **IT IS HEREBY ORDERED:**

16 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is  
17 **GRANTED.**

18 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

19 The District Court Executive is directed to file this Order and provide a copy  
20 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant  
21 and the file shall be **CLOSED.**

22 **IT IS SO ORDERED.**

23 DATED February 24, 2020.



A handwritten signature in black ink, appearing to read "M", is positioned above the printed name of the judge.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE